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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

RAY POLITO,
Petitioner,
vs.
WILLIAM MOLASKY and DOROTHY MOLASKY, MERCHANTS MOTOR FREIGHT, INC., and HERVEY WILLIAMS,
Respondents.

No. 839

PETITION FOR WRIT OF CERTIORARI
and
BRIEF IN SUPPORT THEREOF.

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No. .....

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays that a writ of certiorari be issued to review the final judgment and decree of the United States Circuit Court of Appeals for the Eighth Circuit.

JURISDICTION.

Petitioner appealed to the United States Circuit Court of Appeals for the Eighth Circuit from orders of the District Court of the United States for the Eastern District of Missouri overruling petitioner's motion to remand the cause to the Circuit Court of the City of St. Louis, Missouri, and from a judgment on the merits in favor of defendants (respondents here) and against plaintiff (petitioner here). On November 10, 1941, the United States Circuit Court of Ap-

peals affirmed said judgment in a written opinion reported at 123 Federal (2d) 258. Petition for rehearing was overruled by said Court on November 26, 1941, and issuance of mandate stayed for thirty days from December 6, 1941, to permit the filing of this petition for writ of certiorari.

Under Section 240 (as amended by Act of Feb. 13, 1925) of the Judicial Code of 1911 (Sec. 347, 28 U. S. C. A.), this Court has jurisdiction to review by certiorari this opinion and judgment of the United States Circuit Court of Appeals for the Eighth Circuit.

SUMMARY STATEMENT OF MATTER INVOLVED.

Petitioner Ray Polito, as plaintiff, instituted a suit in the Circuit Court of the City of St. Louis, Missouri, against William Molasky, Dorothy Molasky and Merchants Motor Freight, Inc., as defendants, to recover damages for personal injuries sustained by plaintiff when the fire truck upon which he was riding as a city fireman was struck by a tractor and trailer truck. The cause was removed to the District Court of the United States for the Eastern District of Missouri upon a removal petition filed by defendant Merchants Motor Freight, Inc. This removal petition (Rec. p. 12) alleged that plaintiff and defendants Molasky were citizens and residents of the State of Missouri and defendant Merchants Motor Freight, Inc., was a citizen and resident of the State of Minnesota, and, further, that defendants Molasky were fraudulently joined as parties defendant. The petition further alleged that a separate and severable cause of action existed between plaintiff and defendant Merchants Motor Freight, Inc.; that there was a diversity of citizenship between said parties, and that the amount in dispute was in excess of $3,000.00.

Plaintiff filed his first motion to remand the cause to the

state court, which motion was overruled. Plaintiff then, on May 9, 1940, filed an amended petition in the District Court of the United States joining Hervey Williams as a party defendant. This amended petition (Rec. p. 27) alleged that defendants Molasky and Hervey Williams were citizens and residents of the State of Missouri. Plaintiff then, on May 9, 1940, filed his second motion to remand the case to the Circuit Court of the City of St. Louis (Rec. p. 31). Defendant Merchants Motor Freight, Inc., filed an answer (Rec. p. 34) to said amended petition, which answer contained no statement or allegation whatsoever as to the citizenship and residence of defendant Hervey Williams. The Court ordered testimony heard on plaintiff's second motion to remand, and on August 5, 1940, overruled said motion. Subsequently defendant Hervey Williams filed a separate answer to plaintiff's amended petition, but failed to make any allegation or statement as to the citizenship and residence of said defendant Hervey Williams (Rec. p. 37). On October 4, 1940, plaintiff, by leave of Court, filed his second amended petition containing allegations as to the citizenship and residence of the parties identical to those stated in his amended petition of May 9, 1940 (Rec. pp. 53-59). By leave of Court the answers of the defendants theretofore filed to plaintiff's amended petition were refiled to plaintiff's second amended petition (Rec. p. 59). The case was ordered to trial on the merits and a verdict and judgment rendered and entered in favor of defendants and against plaintiff.

On the appeal taken to the United States Circuit Court of Appeals, said Court held in its opinion: (1) That the District Court properly overruled plaintiff's second motion to remand (Rec. 127); (2) that plaintiff's amended petition did not divest the District Court of jurisdiction, and that the District Court had jurisdiction to try the case on its merits (Rec. p. 127), and (3) that the judgment should be affirmed (Rec. p. 129).

THE QUESTIONS PRESENTED.

Only one major question is involved in this case so far as this petition is concerned. That question is: Did the United States District Court have jurisdiction of this cause at any time after May 9, 1940, when plaintiff filed his amended petition?

This question arises by reason of these facts, about none of which there is any dispute:

1. Plaintiff's amended petition, filed May 9, 1940, joined Hervey Williams as a party defendant. This amended petition alleged that Hervey Williams was a citizen and resident of the State of Missouri, the same state of which plaintiff was a citizen and resident. It further alleged that plaintiff's injuries were the result of the joint and concurrent negligence of all of the defendants.

2. Although defendants Merchants Motor Freight, Inc., and Hervey Williams filed separate answers to plaintiff's amended petition, neither of them made any allegation or statement whatsoever as to the state of which Hervey Williams was a citizen and resident.

3. No place on the face of the record did any allegation of defendant Hervey Williams' citizenship and residence appear except in plaintiff's amended petition and motion to remand, and in both of these pleadings it was alleged that he was a citizen and resident of the same state as plaintiff, to wit, Missouri.

The answer to this major question of jurisdiction is dependent upon the answers to the following subordinate questions:

1. Does the federal court have jurisdiction on the basis of diversity of citizenship where plaintiff and one of the defendants are alleged to be citizens and residents of the same state, and it is further alleged that plaintiff suffered

damages by reason of the joint and concurrent negligence of all of the defendants?

2. Does the filing of an amended petition which alleges and states no facts showing jurisdiction in the federal court (but, on the contrary, alleges facts showing the federal court to be without jurisdiction) deprive the federal court of jurisdiction to hear and determine the cause?

3. Where the face of the entire record shows no facts supporting federal jurisdiction, may the federal court nevertheless hear and determine the cause?

4. Where all of the pleadings in a cause contain only allegations as to citizenship which show the federal court to be without jurisdiction, and no issue is made up by the pleadings on the question of citizenship, may the federal court determine and decide that it has jurisdiction to hear and determine the cause, basing such decision solely on portions of testimony extraneous to the pleadings.

5. May the federal court consider matters other than those appearing on the face of the record proper to determine whether it has jurisdiction of a case?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Certiorari should be granted for the following reasons:

The opinion of the Circuit Court of Appeals in holding that the District Court properly overruled plaintiff's second motion to remand and properly entertained jurisdiction over the cause even to the extent of hearing and determining it on its merits:

First: Is a decision on a federal question in conflict with applicable decisions of the Supreme Court of the United States.

Second: Is in conflict with the applicable decisions of

the United States Court of Appeals for the Eighth Circuit and the United States Courts of Appeal for other circuits.

Third: Involves an important question of federal law which should be definitely settled by this Court.

Fourth: Is a case in which the jurisdiction of a United States District Court is questioned, and in which that Court was totally without jurisdiction.

The judgment of the Circuit Court of Appeals for the Eighth Circuit is final and is erroneous, and this Honorable Court should require the case to be certified to it for its review and determination.

Wherefore, petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that Court to certify and forward to this Court a full and complete transcript of the record of the proceeding in said Court in the case numbered and entitled on its Docket 12,063, Civil, Ray Polito, Appellant, v. William Molasky and Dorothy Molasky, Merchants Motor Freight, Inc., and Hervey Williams, Appellees, to the end that this cause may be reviewed and determined by this Court, as provided for by the statutes of the United States, and that petitioner may have such other and further relief in the premises as the Court may deem proper.

Respectfully submitted,

N. MURRY EDWARDS,

GEORGE C. DYER, II,
Attorneys for Petitioner.

State of Missouri, }
City of St. Louis. } ss.

N. Murry Edwards, of lawful age, being first duly sworn, upon his oath states that he is counsel for Ray Polito, the petitioner, and that he prepared the foregoing petition, and that the allegations thereof are true as he verily believes.

N. Murry Edwards

Subscribed and sworn to before me this 31st. day of December, 1941.

My commission expires March 26, 1943.

Evelyn Burke

Evelyn Burke,
Notary Public, City of St. Louis,
State of Missouri.

(Seal)

BRIEF IN SUPPORT OF PETITION.

I.

Under the federal statutes and cases, if there be more than one defendant, all of the defendants must be liable to be sued in the federal court or jurisdiction cannot be entertained by the federal court. There is no diversity of citizenship such as will sustain federal jurisdiction unless the controversy is between citizens of different states. In this case all of the persons on one side are not citizens of different states from all of the persons on the other side. Plaintiff and defendant Hervey Williams are alleged to be citizens of the same state, to wit, Missouri. Therefore, there is no diversity of citizenship and, consequently, no jurisdiction in the federal court.

The Court of Appeals in holding in its opinion that the federal court did have jurisdiction, and in holding that the District Court properly overruled plaintiff's second motion to remand is in conflict with the following decisions of the United States Supreme Court and the United States Court of Appeals:

In the case of **Treinies v. Sunshine Mining Co.**, 60 S. Ct. 44 (308 U. S. 66), this Court said at page 47:

> "Without ruling as to possible limitations of the constitutional grant, it is held by this court that the statutory language of the respective judiciary acts **forbids suits in the Federal Court unless all of the parties on one side are of citizenship diverse to those on the other side.**"

In the case of **Colony Coal & Coke Corp. v. Napier**, 28 F. Supp. 76, the Court said at page 79:

> "As to the other condition upon which Federal jurisdiction is made to depend, viz., diversity of citizenship between the parties, it is a familiar rule that

such diversity does not exist, within the meaning of the Code provision defining jurisdiction, unless **all persons on one side of the case are citizens of different states from all persons on the other side.''**

In the case of **Wetherby v. Stinson**, 62 Fed. 173 (Seventh Circuit Court of Appeals), appellant, a citizen of Minnesota, brought his bill of complaint against the defendants, alleging that three of them were residents and citizens, respectively, of Illinois or Wisconsin, and the fourth, Daniel A. Robertson, a resident and citizen of Minnesota. Defendant Robertson filed a disclaimer.

At page 175 the Court said:

> ''The bill shows that when the suit was begun the complainant and Robertson, one of the respondents, were citizens of the same state, and, though not suggested in the briefs or at the hearing, we are compelled to recognize the lack of federal jurisdiction in this case.- Robertson's disclaimer did not cure the defect, because if for no other reason he was not dismissed out of the case but remained a party to the end.''

Again at page 177 the Court said:

> ''Upon the facts as they are, the lack of jurisdiction is clear, and it follows that the decree dismissing the bill for equity should be set aside and a dismissal for want of jurisdiction should be entered but without costs.''

II.

The complaint and the entire record in this case showed only that plaintiff and defendant Hervey Williams were citizens and residents of the State of Missouri. None of the pleadings filed by defendant alleged that Williams was a citizen and resident of some state other than Missouri. There was, therefore, no diversity of citizenship and the United States Court of Appeals erred in its opinion in

holding that the federal district court had jurisdiction over the cause.

Plaintiff's amended petition (Rec. p. 27), filed May 9, 1940, alleged "that defendants Molasky and Hervey Williams are now and were at all the times hereinafter mentioned citizens and residents of the City of St. Louis, Missouri."

The answer of defendant Merchants Motor Freight, Inc. (Rec. p. 34) filed to this amended petition alleged: "admits that plaintiff is a resident of the State of Missouri; admits that it is a corporation, but expressly denies that it is duly organized and existing under and by virtue of the laws of the State of Missouri, and states that it is in fact duly organized and existing under the laws of the State of Minnesota and is a citizen and resident of said state and not a citizen or resident of the State of Missouri." This answer contained no allegation whatsoever as to the citizenship or residence of defendant Hervey Williams.

The answer of defendant Hervey Williams (Rec. p. 37) to this amended petition alleged: "This defendant has insufficient knowledge or information about the citizenship of William Molasky and Dorothy Molasky and about the corporate existence of the Merchants Motor Freight, Inc., to admit any one or all of the allegations of plaintiff's petition pertaining to such matters, and, therefore, denies each and all of said allegations." This answer contained no allegation whatsoever as to the citizenship or residence of defendant Hervey Williams.

On October 4, 1940, plaintiff filed his second amended petition (Rec. p. 53), upon which the case was tried, and again alleged "that defendants William and Dorothy Molasky and Hervey Williams are now and were at all the

times hereinafter mentioned, citizens and residents of the City of St. Louis, Missouri."

Defendants Merchants Motor Freight, Inc., and Hervey Williams refiled their original answers to this second amended petition (Rec. p. 59).

Plaintiff's second motion to remand, filed May 9, 1940 (Rec. p. 31), and overruled by the District Court, alleged again that plaintiff's action was a joint one under the laws of the State of Missouri against several defendants, of whom defendants William Molasky, Dorothy Molasky and Hervey Williams were residents and citizens of the State of Missouri, the same as plaintiff.

It is therefore clear that the record showed affirmatively that no diversity of citizenship existed.

In the case of **Hay v. May Co.**, 271 U. S. 318, 46 S. Ct. 318, this Court said, at page 321:

> "It is well settled by the decisions of this court that an action brought in a state court against two defendants jointly, in which the plaintiff states a case of joint liability arising out of the concurrent negligence of the defendants, does not present a separable controversy authorizing the removal of the cause to a federal court, even though the plaintiff might have sued the defendants separately; **the allegations of the complaint being decisive as to the nature of the controversy in the absence of a showing that one of the defendants was fraudulently joined** for the purpose of preventing removal. Louisville & Nashville Railroad v. Wangelin, 132 U. S. 599, 601; Powers v. Chesapeake & Ohio Railway, 169 U. S. 92, 97; Alabama Southern Railway v. Thompson, 200 U. S. 206, 214; Chicago, R. I. & Pac. Railway v. Dowell, 229 U. S. 102, 111; McAllister v. Chesapeake & Ohio Railway, 243 U. S. 302, 310; Chicago & Alton Railroad v. McWhirt, 243 U. S. 422, 425."

The United States Circuit Courts of Appeal have held that this same test is to be applied in determining jurisdiction when an amended pleading is filed in the federal court. The test is: **Does the face of the record show jurisdiction in the federal court?**

In the case of **Highway Construction Co. v. McClelland,** 15 F. (2d) 187, the Eighth Circuit Court of Appeals held that when an amended petition was filed in the District Court showing **on the face of the pleading** that the District Court no longer had jurisdiction, the cause should be remanded to the state court for trial. In that case the Court said, at page 188:

> "But it is contended by counsel on both sides that, inasmuch as the case had been removed and no motion had been made to remand, the Federal Court had jurisdiction, and that nothing which happened afterward could divest such jurisdiction. We cannot agree with this contention. While it is the general rule that jurisdiction having once attached, will not be divested by subsequent events, yet there is this exception to the rule: **The plaintiff, after jurisdiction has attached, may so change his pleading voluntarily that the Court will no longer have jurisdiction on the face of the pleading. If this is done, it then becomes the duty of the Court to remand the case, if it be a removed case.**"

In the case of **De Vost v. Twin State Gas & Elec. Co. et al.,** 250 Fed. 349, where **the plaintiff amended his petition by adding a party defendant who was a resident and citizen of the same state as the plaintiff,** the Circuit Court of Appeals for the First Circuit said, at page 352:

> "We see no escape from the conclusion that * * * **the amendment** as to parties and as to the cause of action made by leave of the court, **had the effect of ousting the jurisdiction of that Court.** Thereafter it had no power to enter judgment on the merits for either plaintiff or defendant."

The Eighth Circuit Court of Appeals, in the case of **Jewell v. Cleveland Wrecking Company of Cincinnati**, 111 F. (2d) 305, had before it precisely the situation presented in the present case. The case involved a suit to recover for personal injuries suffered on the site of the Federal Building in Kansas City, Missouri, filed in the state court and then removed to the federal court on defendant's removal petition, which alleged that the accident occurred on the site of the Federal Building owned by the United States. Plaintiff's amended petition alleged that the accident happened at Ninth and Grand, but omitted any allegation that this was the site of the Federal Building, or that the site was owned by the United States. Upon the argument of the motion to remand it was conceded by the parties that the accident happened at the site of the Federal Building, and that this site was owned in fee by the United States. The motion to remand was denied. On appeal the Court of Appeals said at page 305:

> "The court below concluded that the suit was within its jurisdiction upon the ground that the cause of action asserted arose under laws governing territory which was owned by, and was under the exclusive jurisdiction of, the United States, and that the laws governing such territory were of necessity laws of the United States. **The Court based its conclusion upon the facts stated in the petition for removal and the concessions of the parties made upon the argument of the motion to remand, and did not base it upon the allegations of the plaintiff's amended complaint.**
>
> "What counsel and the court below completely overlooked was that, in order to raise the question which was argued and decided, it would have been necessary to amend the amended complaint, upon which jurisdiction depended. **The allegations of that complaint, constituting the statement of plaintiff's claim, were all that could be considered in determining whether the case was within the jurisdiction of the District Court**

and was removable. Since the amended complaint obviously failed to show that the plaintiff's cause of action was based upon any law of the United States, and failed to disclose any dispute or controversy existing between the parties relative to the construction, operation or effect of Constitution or laws of the United States, **the court below was without jurisdiction of the case and should have remanded it.**

"The fact that the question of the insufficiency of the amended complaint to show jurisdiction was not presented or argued in the court below, is of no consequence, since it is the duty of this Court to determine questions relating to that court's jurisdiction, whether they are argued or not. Louisville & Nashville R. Co. v. Mottley, 211 U. S. 149, 152, 29 S. Ct. 42, 53 L. Ed. 126; Huffman v. Baldwin, 8 Cir., 82 F. (2d) 5, 7, and cases cited.

"The judgment appealed from is reversed with directions to remand the case to the Circuit Court of Jackson County, Missouri."

In the case at bar the amended petition showed that both plaintiff and defendant Williams were citizens and residents of the State of Missouri and that plaintiff's injuries were the direct result of the joint and concurrent negligence of defendants Williams and Merchants Motor Freight, Inc.

Under the ruling in the Jewell case, supra, these allegations of plaintiff's amended petition were all that could be considered to determine whether there was federal jurisdiction. Since, beyond question, they show that the federal court was without jurisdiction, the cause should be remanded to the state court.

The case of **Harrington v. Great Northern Ry. Co.**, 169 Fed. 714, referred to in the Court of Appeals' opinion, is a District Court of Iowa decision, which clearly illustrates

plaintiff's point in the case at bar, that due to the absence of any pleading by defendant specifically alleging that Hervey Williams was a resident and citizen of some state other than Missouri, the only thing before the Court in deciding the question of remand was the specific allegation in plaintiff's amended petition that Williams was a resident and citizen of the State of Missouri.

In the Harrington case the pleadings on file in the case plainly showed a controverted issue as to the residence and citizenship of the plaintiff. Defendant's removal petition specifically alleged that the plaintiff was a resident and citizen of Iowa, whereas the plaintiff's motion to remand alleged that she was a citizen and resident of Nebraska. The District Court held that under the practice prevailing in its district (to wit, Iowa), inasmuch as the motion to remand controverted the allegations of facts contained in the removal petition, a question of fact was raised by the pleadings, upon which the Court would hear evidence. The District Court in its opinion did not rule on the motion to remand, but merely stated that it would hear evidence on it. The Court's ruling was not reviewed by any appellate court.

In the case at bar no question of fact as to the citizenship and residence of the parties was raised by the pleading. Defendants never in any pleading alleged that defendant Hervey Williams was a resident of some state other than Missouri.

III.

This Court has always held that it will determine the fundamental question of the jurisdiction of the Court from which the record comes; that it will review this question of jurisdiction even where it has not been raised or suggested by the parties.

In the case of **M. C. & L. M. Railway Company v. Swan**, 4 S. Ct. 510, 111 U. S. 379, this Court said at page 382:

> "It is true that the plaintiffs below, against whose objection the error was committed, do not complain of being prejudiced by it; and it seems to be an anomaly and a hardship that the party at whose instance it was committed should be permitted to derive advantage from it; but the rule springing from the nature and limits of the judicial power of the United States, is inflexible and without exception, which requires this Court of its own motion to deny its own jurisdiction, and in the exercise of its appellate power, that of all other courts of the United States, **in all cases where such jurisdiction does not affirmatively appear in the record** on which, in the exercise of that power, it is called to act. **On every writ of error or appeal the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself**, even when not otherwise suggested, and without respect to the relations of the parties to it."

In the case of **Bors v. Preston**, 111 U. S. 252, this Court said, at page 255:

> "In cases of which the Circuit Court may take cognizance only by reason of the citizenship of the parties, this court, as its decisions indicate, has, except under special circumstances, declined to express any opinion upon the merits on appeal or writ of error, **where the record does not affirmatively show jurisdiction in the court below**; this, because the Courts of the Union, being courts of limited jurisdiction, **the presumption**, in every stage of the cause, **is, that it is without their jurisdiction unless the contrary appears from the record.**"

It will be noted that in the above case this Court states the rule to be that there is a presumption that the lower

court is without jurisdiction unless the record affirmatively shows jurisdiction. Certainly, in the case at bar the record does not affirmatively show that the District Court had jurisdiction. On the contrary, the record affirmatively shows that the case is of the class excluded altogether from federal cognizance.

In the case of **Mitchell, Insurance Commissioner of California, v. Maurer,** 55 S. Ct. 162, 293 U. S. 237, this Court, in an opinion delivered by Justice Brandeis, said, at page 244:

> "Unlike an objection to venue, lack of federal jurisdiction cannot be waived or be overcome by an agreement of the parties. **An appellate federal court must satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a cause under review.** Hence, the failure of the Insurance Commissioner to claim, in his **petition for certiorari,** that the order of the District Court was void for lack of federal jurisdiction of the suit, and his failure otherwise to call to the attention of this court the lack of diversity of citizenship are immaterial."

It will be noted that in the above case this Court stated that even though the petition for certiorari did not call its attention to the absence of jurisdiction, because the lack of diversity of citizenship appeared on the face of the record, it would review the question.

Conclusion.

From all of the facts in this case and the decisions set out in this brief it is clear that there is a conflict between the opinion of the Court of Appeals in this case and opinions of this Court, the Eighth Circuit Court of Appeals and other Circuit Courts of Appeal, and it is clear that the Circuit Court of Appeals erroneously held that the

federal court correctly overruled plaintiff's motion to remand and had jurisdiction to hear and try this case on its merits. It is further clear that an important question of federal law is involved in this case—that is, the question of federal jurisdiction, which has always been diligently investigated by this Court—and that this question of federal law should be definitely settled by this Court.

The petition for certiorari should, therefore, be granted.

N. MURRY EDWARDS,
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Attorneys for Petitioner.